

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D153/2005

### CATCHWORDS

*Victorian Civil and Administrative Tribunal Act 1998 – Ss.75, 77 and 78 – whether particulars of Points of Claim so inadequate that application should be struck out – allegation of failure to comply with orders – observations re technicalities.*

[2006] VCAT 1308

**FIRST APPLICANT:** Constantinos Houndalas  
**SECOND APPLICANT:** Kevin Moran  
**RESPONDENT:** Robert Burnham  
**WHERE HELD:** Melbourne  
**BEFORE:** His Honour Judge Bowman  
**DATE OF HEARING:** 19 June 2006  
**DATE OF REASONS:** 6 July 2006

### ORDERS

- (a) Pursuant to s.77(1) of the Act, references to the *Trade Practices Act 1974* in paragraphs 40, 42, 48, 50 and 58(e) of the Amended Points of Claim are struck out.
- (b) The Respondent's application pursuant to s.75 of the Act is dismissed.
- (c) The Respondent's application pursuant to s.78 of the Act is dismissed.
- (d) The Applicants' application pursuant to s.78 of the Act is dismissed.
- (e) The date by which the Respondent must file and serve Points of Defence, and the self-executing order in relation thereto made by Senior Member Cremean on 1<sup>st</sup> March 2006, remains extended to 21<sup>st</sup> July 2006.
- (f) On or before 31<sup>st</sup> July 2006, the Applicants' shall file and serve Further and Better Particulars as follows:-
  - (i) Particulars of alleged negligence, lack of care and skill and the like in accordance with paragraph 49 of the Reasons for Decision delivered this day and attached hereto.
  - (ii) Particulars of any breach of statutory provisions in accordance with paragraph 50 of the Reasons for Decision delivered this day and attached hereto.

- (iii) Particulars of loss and damage in accordance with paragraph 54 of the Reasons for Decision delivered this day and attached hereto.
- (g) Question of costs reserved.
- (h) Question of any alteration to the timetable fixed by Senior Member Cremean on 1<sup>st</sup> March 2006 reserved.
- (i) Liberty to apply.

**Judge Bowman**  
**Vice President**

**APPEARANCES:**

For the Applicants:

Ms Bizos, Solicitor, of Dandanis &  
Associates

For the Respondent:

Mr Mulcahy, Solicitor, of Doyles,  
Construction Lawyers

## REASONS FOR DECISION

### GENERAL BACKGROUND

- 1 This matter comes before me by way of applications pursuant to s.75, 77 and 78 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the Act”). One set of applications, involving all three sections, was made by Robert Burnham (“Burnham”) who is the respondent to a claim made by Constantinos Houndalas and Kevin Moran, whom I shall describe collectively as “Houndalas”. There is also to be determined an application pursuant to s.78 of the Act in which Houndalas seeks that the proceeding be determined in his favour because of Burnham allegedly conducting the proceeding vexatiously and failing to comply with orders of the Tribunal without reasonable excuse. It would appear that at one stage another entity, Urban Tide Pty Ltd, with which Burnham was associated, may also have been involved in this proceeding, but that is apparently no longer the case and it need not concern us.
- 2 Mr Mulcahy of Doyles appeared as solicitor for Burnham. Ms Bizos of Dandanis & Associates appeared as solicitor for Houndalas. No oral evidence was adduced. Each legal representative made careful and helpful submissions.

### FACTUAL BACKGROUND

- 3 The following references to factual matters are made solely for the purposes of the applications before me and do not in any way represent findings of fact on the merits. They are not intended to have any binding effect upon the principal application, and are included only so as to make these rulings more understandable and place them in context. This qualification does not apply to such matters as the dates upon which events in the chain of litigation occurred.
- 4 This dispute concerns the construction of a dwelling on land at 1215 Malvern Road, Malvern. It is alleged by Houndalas that he entered into a building agreement with Burnham pursuant to which Burnham agreed to construct the dwelling. There were terms of the agreement concerning the times at which various steps would be taken, the manner in which the construction works would be carried out and the like. Alternatively, it is alleged that Houndalas and Burnham entered into a project management agreement pursuant to which Burnham would act as project manager of the construction of the dwelling. Again, there were terms relating to the total construction cost, a completion date of the project, the care and skill to be taken and the like. In relation to the building agreement, it is alleged that Burnham breached several of the terms and, in December 2003, effectively ceased work and abandoned the site. By so doing, Burnham repudiated the building agreement, which repudiation was accepted by Houndalas. A further and alternative claim is made against Burnham in negligence. It is also alleged that Burnham made to Houndalas a number of representations which were false and misleading and in contravention of the *Fair Trading Act 1999*.

- 5 In relation to the project management agreement, it is alleged that Burnham breached various terms of it, and effectively failed to finish the project in reasonable time with due diligence, or at all. A further and alternative claim based in negligence is also made. Houndalas seeks damages.
- 6 The history of the litigation before this Tribunal could be summarised briefly as follows. On approximately 8<sup>th</sup> March 2005, Houndalas issued an application out of this Tribunal. Annexed to such application were Points of Claim, which, in essence, set out the matters referred to above. However, paragraphs 40, 42, 48, 50 and 56 made reference to and placed reliance upon the *Trade Practices Act* 1974, which is, of course, a Commonwealth Act.
- 7 On 21<sup>st</sup> April 2005, a directions hearing was conducted by Deputy President Aird. A timetable was set in place, including orders that Houndalas file and serve itemised particulars of loss and damage by 6<sup>th</sup> May 2005 and that Burnham, who at this stage does not appear to have had legal representation, file and serve Points of Defence by 20<sup>th</sup> May 2005.
- 8 On 13<sup>th</sup> May 2005, Houndalas filed and served Particulars of Loss and Damage. These were comparatively brief, consisting, in essence, of an amount for the total cost of construction plus interest, less either the total amount allowed in the project management agreement, or, alternatively, in the building agreement. Thus, Houndalas claimed damages of either \$454,272.57 or \$369,272.57. The details of the total cost of the construction, which was put at \$719,272.57, are, on their face, extremely brief.
- 9 On 17<sup>th</sup> June 2005, a further directions hearing was conducted by Senior Member Walker. A new timetable was arranged, and this included orders that Houndalas by 15<sup>th</sup> July 2005 provide further particulars of the loss and damage claim, setting out how the figure specified for building costs was made up. It also included an order that Burnham file and serve Points of Defence by 12<sup>th</sup> August 2005.
- 10 On 18<sup>th</sup> July 2005, Houndalas filed and served Further Particulars of Loss and Damage. These further particulars were constituted by a detailed list of expenses. The list includes expenses from “Con’s diary” and from “NAB chequebook”. As I pointed out from the bench, some of the items listed do not strike me as being construction costs that would have been lost as a result of the change of builders. An example of this is the item “pre-building costs”, which include such matters as architects’ fees.
- 11 In any event, Burnham was dissatisfied with this method of providing Further Particulars of Loss and Damage, and wrote to the Senior Registrar of this Tribunal complaining of the “grossly inadequate” nature of particulars being supplied in this fashion.
- 12 A further directions hearing was conducted by Senior Member Cremean on 3<sup>rd</sup> August 2005. It is noted that Burnham failed to attend and a modest costs order was made against him. The orders of 17<sup>th</sup> June 2005 were confirmed and the directions hearing adjourned to the date of the compulsory conference, which had previously been set for 21<sup>st</sup> October 2005.

- 13 On 18<sup>th</sup> August 2005, Houndalas' solicitors wrote to the Registrar of this Tribunal pointing out that Burnham failed to file and serve his Points of Defence within the time ordered, and foreshadowing an application for judgment in default of defence.
- 14 A further directions hearing was conducted on 4<sup>th</sup> October 2005 before Member Walsh. The date of the compulsory conference was vacated, and it was refixed on 16<sup>th</sup> December 2005. Member Walsh ordered the parties to file and serve Position Papers (including the ordered particulars), Houndalas to do this by 28<sup>th</sup> October 2005 and Burnham to respond by 30<sup>th</sup> November 2005.
- 15 On 21<sup>st</sup> November 2005, Burnham wrote to this Tribunal, claiming Houndalas had failed to provide the Position Paper by 28<sup>th</sup> October 2005, and claiming that details of the claim had still not been verified and that his patience was at an end.
- 16 On 13<sup>th</sup> December 2005, Burnham again wrote to this Tribunal claiming that he had not been served with the Position Paper and that, accordingly, he had no particulars of loss and damage. In the circumstances, he sought an adjournment of the compulsory conference. In his letter, there is reference to a telephone conversation indicating that Houndalas' Position Paper had been forwarded to VCAT on 2<sup>nd</sup> November 2005, but Burnham had no copy of this.
- 17 On 16<sup>th</sup> December 2005, a compulsory conference which served as a directions hearing was conducted by Senior Member Lothian. The dispute was not resolved. A detailed timetable, culminating in a hearing date of 29<sup>th</sup> May 2006, was set out. Burnham was ordered to file and serve Points of Defence (and any counterclaim) by 27<sup>th</sup> January 2006. Dates were also set for the filing and serving of witness statements, expert reports, and the like. There appears to have been no order in relation to Further Particulars of Loss and Damage. Burnham is recorded as having been present.
- 18 On 22<sup>nd</sup> January 2006, Burnham wrote to this Tribunal stating that the orders of 16<sup>th</sup> December 2005 had been sent to the incorrect address, and were only received by him on 20<sup>th</sup> January 2005. He now wished to engage a legal practitioner to act on his behalf, and sought that the time for his filing and serving Points of Defence and any counterclaim be extended to 10<sup>th</sup> February 2006. The Senior Registrar responded by letter on 24<sup>th</sup> January 2006, pointing out that the extension of dates in relation to previously made orders required the written consent from all parties involved.
- 19 On 21<sup>st</sup> February 2006, Houndalas issued an application seeking that he be granted judgment in the sum of \$454,272.57, plus costs, in default of a defence having been filed by Burnham. The attached letter pointed out the number of occasions upon which Burnham had failed to file and serve Points of Defence as ordered.
- 20 On 23<sup>rd</sup> February 2006, Doyles, Construction Lawyers, informed the Tribunal that they had been engaged to represent Burnham. That firm continues to act for Burnham.

- 21 A further directions hearing was conducted by Senior Member Cremean on 1<sup>st</sup> March 2006. He ordered a new timetable, culminating in a hearing date of 30<sup>th</sup> October 2006. Amongst his orders are the following. By 15<sup>th</sup> March 2006, Houndalas was to file and serve any Amended Points of Claim, including in the same any allegations to be made under the *Fair Trading Act* 1999. (I accept that, at this directions hearing, it was pointed out that VCAT has no jurisdiction to deal with matters relating to the *Trade Practices Act*, it being Commonwealth legislation). By 29<sup>th</sup> March 2006, Burnham was to file and serve any request for further and better particulars of the amended claim. These were to be filed by Houndalas by 19<sup>th</sup> April 2006. Burnham was ordered to file and serve Points of Defence by 10<sup>th</sup> May 2006, and a further order was made that, in the event that he failed to comply with this, the proceeding would stand determined against him in an amount and for costs to be assessed. This particular order was expressed as prevailing over the balance of the timetable. The application to enter judgment in default of defence was dismissed. An undertaking by Burnham to pay the previously ordered costs was noted, and he was ordered to pay a further amount in respect of the costs of 1<sup>st</sup> March 2006.
- 22 On 14<sup>th</sup> March 2006, Houndalas filed Amended Points of Claim. The amendments did little more than add to paragraphs 40, 42, 48, 50 and 56 that there had been contravention of ss.4 and 11 of the *Fair Trading Act* – s.4 in relation to paragraphs 42 and 50, and s.11 in relation to paragraphs 40 and 48. The references to the *Trade Practice Act* were not deleted, despite the discussion at the directions hearing on 1<sup>st</sup> March 2006. For some reason reference to s.4 and 11 of the *Fair Trading Act* was also added to paragraphs 10 and 11 despite the fact that such reference was already there.
- 23 On 19<sup>th</sup> April 2006, Houndalas filed Further and Better Particulars of the claim, these apparently being pursuant to a request of 23<sup>rd</sup> March 2006. The majority of the particulars so supplied is to be found by reference to annexures to the document. These annexures are a report from Prowse Quantity Surveyors; a report from BSGM Consulting Building Surveyors; and what appear to be the same lists previously supplied and referred to in paragraph 10 above. Some other particulars are provided in narrative form in the document itself.
- 24 On 28<sup>th</sup> April 2006, Burnham requested a directions hearing at which application would be made for various orders. These included a dismissal pursuant to s.78 of the Act; alternatively, a self-executing order in relation to the service of Further and Better Particulars by Houndalas (no submission was made to me in relation to this particular order, which I would not have been minded to grant in any event); the striking out of those paragraphs of the Amended Points of Claim which contain reference to the *Trade Practices Act*; and the amending of the timetable.
- 25 On 4<sup>th</sup> May 2006, Houndalas filed with this Tribunal an application for orders that Burnham had been vexatiously conducting the proceeding; that the proceeding be determined in favour of Houndalas pursuant to s.78 of the Act because of the failure of Burnham to comply with orders of the Tribunal without reasonable excuse; and that Burnham pay to Houndalas the damages sought. The

letter accompanying this application referred to Burnham failing to pay the amount of costs ordered against him by Senior Member Cremean.

- 26 On 8<sup>th</sup> May 2006, Burnham indicated that further orders would be sought at a directions hearing on 9<sup>th</sup> May. These included proposed orders that various paragraphs of the Amended Points of Claim be struck out pursuant to s.75 of the Act on the grounds that they were misconceived, lacking in substance or otherwise an abuse of process. A lengthy affidavit of Mr Mulcahy, complete with a number of exhibits, was also filed. A previous and substantial affidavit with exhibits had been filed by him on 28<sup>th</sup> February 2006.
- 27 On 9<sup>th</sup> May 2006, a directions hearing was conducted by Senior Member Davis. Burnham undertook to pay an outstanding costs order, and Senior Member Davis extended the time in relation to the self-executing order of Senior Member Cremean to 20<sup>th</sup> June 2006. The directions hearing, involving as it did the applications pursuant to ss.75, 77 and 78, was otherwise adjourned. The existence of the application pursuant to s.77 necessitated the hearing of that application by a judicial member, and accordingly, and sensibly, all applications were adjourned so that they could be heard at the same time. Ultimately, the applications came on for hearing before me on 19<sup>th</sup> June last. The time in relation to the self-executing order was then extended by me.
- 28 I have set out the history of this litigation in very considerable detail because some appreciation of it is necessary in order to better understand the applications made and the ruling which I shall make. In addition, given the history of this matter, it could be that further preliminary arguments occur in which case a history of the litigation to this point in time might be useful.
- 29 Against this background, and before proceeding to a ruling, I shall set out summaries of the cases advanced by the parties in the order in which they were presented. I shall refer only to those arguments which I consider to be of importance or relevance. For example, a considerable amount of time was spent arguing about the email address to which a document had been sent, an issue which I consider to be of no great moment.

#### **THE CASE ON BEHALF OF BURNHAM**

- 30 The arguments advanced by Mr Mulcahy on behalf of Burnham could be summarised as follows. Whilst VCAT is not a court of pleadings, it is a basic rule of natural justice that a party is entitled to know the nature of the case against it so that it can defend that case. It should receive sufficient information to ensure a fair trial. Houndalas has been ordered on several occasions to provide adequate particulars. The current Amended Points of Claim and Further and Better Particulars still fail to provide fundamental details.
- 31 In relation to the application pursuant to s.77, it is clear that VCAT does not possess jurisdiction to deal with matters brought pursuant to the *Trade Practices Act*. Despite being told of this, Houndalas has still not removed references to that Act from the relevant paragraphs. Those references should be struck out.

- 32 Turning to the application pursuant to s.75, the state of the law is that VCAT may dismiss all or part of a proceeding if it is obviously hopeless, obviously unsustainable in fact or law, and/or bound to fail. In the present case, s.75 should be invoked so as to strike out some of the allegations based upon breach of the contract and, more negligence, and those based upon breach of statutory provisions. In relation to the breach of contract allegations, paragraphs which should be struck out are those alleging a failure to carry out works with reasonable care and skill, and failing to carry out works in a workmanlike manner. Burnham sought the identification of defective works so that such allegations could be answered. The Further and Better Particulars provided essentially refer to the report of BSGM Consulting Building Surveyors. This lists incomplete or varied work, rather than defective work. The same criticism can be made of the paragraphs of the Amended Points of Claim dealing with common law negligence. Concerning the allegation of breach of statutory provisions, this is pleaded in an extremely general fashion, such as alleging breaches of “the law”. In addition, the same criticism concerning reference to the BSGM report can again be made, as that report makes no mention of either defective work or work which fails to conform with any statutory or regulatory instrument. Given that no defective work has been identified, Houndalas has failed to disclose a cause of action, either in contract, negligence, or in breach of statutory provisions. The allegations are therefore hopeless or certain to fail.
- 33 In relation to the application pursuant to s.78 of the Act, the entire application should be dismissed as Houndalas has behaved in an evasive manner. His responses to orders of VCAT have been token, without substance, and with specific design to confuse Burnham. After thirteen months and four directions hearings, the Amended Points of Claim are identical to the original Points of Claim, save for the addition of the *Fair Trading Act* allegations, which are extremely brief. The Further and Better Particulars provided are inadequate and defective. In relation to the breach of contract allegations and the alleged failure of Burnham to complete the works, reference is made by Houndalas to the details of the work completed as set out in the report of Prowse Quantity Surveyors. That document is untitled; it contains no statement of purpose; it consists of a list of quantities; it makes no reference to the dwelling in question being that which is the subject of the dispute; it makes no reference to Houndalas; and, in summary, contains no details whatsoever to connect it with the project in dispute. Whilst Houndalas alleges that the document sets out details of works completed as at 17<sup>th</sup> December 2003, the document itself clearly states that it was produced on 16<sup>th</sup> September 2004. Furthermore, the report of Prowse Quantity Surveyors is inconsistent with and contradictory of the report of BSGM. On the question of incomplete works, it is not clear to which of the two reports Burnham should look. Furthermore, the BSGM report refers to the structure being almost complete, whereas the Prowse report, dated some eight months later, refers to a proposed project. Insofar as allegations are based upon breaches of the project management claim, basic terms, such as the scope of works agreed, the responsibilities of Burnham, monies allegedly paid, and works completed have been omitted, and Houndalas has refused to provide further particulars.

- 34 Turning to damages, again s.78 should be invoked. The attempt to get clarification of damages has been a saga. In relation to the alleged breach of the building contract, no reference has been made to any particular clause of the contract upon which reliance is placed. The Further and Better Particulars supplied in relation to the grounds for damages under each agreement and the calculation of damages are contradictory and cannot be rationally comprehended. Those particulars allege that Houndalas made payments to Burnham in the sum of \$431,888.60 as per an annexure which consists of a profit and loss statement summary and a general ledger of all transactions. The profit and loss statement refers to payment to Burnham of \$70,434.62. The general ledger provides an itemised description of how \$431,888.60 was in fact paid to various suppliers and tradespeople. This is a massive internal contradiction. Furthermore, the figure claimed in part relates to a period before Burnham was engaged and after he ceased. In relation to damages, the Further and Better Particulars also refer to other documents which are simply undated lists with no explanation as to the nexus between them and the damages claim. Burnham should not have to speculate as to the interpretation of the various documents and as to what Houndalas is in fact claiming. There is also no reference to any particular clause in the project management agreement insofar as it may be related to the damages claimed.
- 35 The cumulative effect of these clauses is such that the matter should be struck out pursuant to s.78 of the Act. Burnham has always wanted Houndalas to simply make it clear what was being alleged and claimed.

### **THE CASE ON BEHALF OF HOUNDALAS**

- 36 The arguments advanced by Ms Bizo on behalf of Houndalas could be summarised as follows. Houndalas has complied with all orders made by this Tribunal. In relation to the application pursuant to s.77, Houndalas added the references to the *Fair Trading Act* as demonstrated in the Amended Points of Claim. There is no argument concerning the striking out of the references to the *Trade Practices Act*.
- 37 In relation to the Further and Better Particulars supplied by Houndalas, the object has always been to give to Burnham sufficient particulars to enable him to file Points of Defence. The Further and Better Particulars provided are sufficient to enable this to be done. Normally further and better particulars are not a precursor to the filing of a defence. Alleged inadequacies in Houndalas' particulars or proofs can be raised in the Points of Defence or at the hearing. Burnham is attempting to turn these preliminary arguments into a hearing. Potential flaws in Houndalas' case can be argued at the ultimate hearing.
- 38 There is a history of non-compliance by Burnham with orders of VCAT. That is why there have been so many directions hearings. This has caused the alterations to the timetable. There has also been non-compliance in relation to Tribunal orders that Burnham pay costs by certain dates. In the light of all this non-compliance, perhaps it is Burnham's intention not to file points of defence, given that the matter has now been dragging on now for in excess of a year. Burnham

has conducted the proceeding vexatiously. Pursuant to s.78 of the Act, the proceeding should be determined in favour of Houndalas. Burnham should pay to him damages. Alternatively, basically Houndalas wants the matter to progress and for Burnham to file Points of Defence.

- 39 In answer to a question of mine concerning, in broad terms, how damages are being claimed and what they may be, it was clarified that the project has in fact been completed. I had raised the issue of whether all of the expenditure referred to in Houndalas' Further and Better Particulars had in fact been lost, as it might have been if the project was completely abandoned, or whether some of that expenditure related to costs which would have been necessarily incurred in any event as part of the project. The pre-building costs could be an example of expenditure not wasted and therefore not a loss. Ms Bizos stated that it is quite standard practice to provide further particulars of loss and damage prior to trial, and it is unusual for an opposing party to bring an application seeking to clarify this, or seeking to strike out a matter because of the absence of particulars at a stage such as this when that party has not even filed a defence. In the present case, full particulars of loss and damage will be provided, prior to the hearing, but a lot of material has already been provided and that is certainly sufficient to enable Burnham to prepare a defence. For this purpose, Burnham cannot say that he has no idea as to what allegations are being made against him.

## **RULING**

- 40 I shall deal firstly with the applications by Burnham.
- 41 Effectively there is no dispute insofar as the application pursuant to s.77 of the Act is concerned. There is no real argument concerning the application pursuant to s.77 of the Act. The references to the *Trade Practices Act* are inappropriate and should have been deleted. It might well be thought that the amendments to the Points of Claim, which consist solely of adding brief references to the *Fair Trading Act*, and in two instances unnecessarily, whilst not deleting the references to the *Trade Practices Act*, are somewhat careless. I accept that these matters were discussed before Senior Member Cremean on 1<sup>st</sup> March last, and the deletion of references to the *Trade Practices Act* should have been made after that date. However, whilst this may have been careless, it does not seem to me that any great disadvantage has been caused to Burnham by this, as the fact that no reliance upon these provisions was going to be attempted, or was possible, should have been clear.
- 42 Section 77(1) of the Act permits the striking out of all or any part of a proceeding if the Tribunal considers that the subject matter of the proceeding would be more appropriately dealt with by another body. There may then be referral to that body. It seems to me that striking out of the parts of the proceeding referring to the *Trade Practices Act* would be more appropriate pursuant to s.75(1)(a) of the Act on the basis that such parts are misconceived. However, I have been asked to perform such striking out pursuant to s.77(1) and will do that. There has been no request for a referral elsewhere pursuant to s.77(3). Clearly any claim in

which reliance is placed upon the *Trades Practices Act* would be more appropriately dealt with by a body possessing Federal jurisdiction.

- 43 Accordingly, in paragraphs 40, 42, 48, 50, and 56(e), references to the *Trade Practices Act 1974* are struck out.
- 44 I shall now turn to Burnham's application pursuant to s.75 of the Act. Burnham seeks that paragraphs 24(c)-(e), 29, 30, 31, 32, 33 and 34 of the Amended Points of Claim be struck out. Apart from the submission that the allegations of breach of statutory provisions is extremely broad, the central theme of this submission is that, whilst incomplete works have been listed, no defective work has been identified. The BSGM report on which reliance is placed does not identify defective work, but only refers to incomplete or varied work. Therefore, it is argued, there is no substance to allegations of a lack of reasonable care and skill on the part of Burnham in carrying out the works performed by him.
- 45 I am not prepared to strike out these paragraphs. Many of the principles to be applied in relation to a strike out application pursuant to s.75 were discussed by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. For such an application to succeed, the proceeding must be obviously hopeless, obviously unjustifiable in fact or in law, on no reasonable view justifying relief, or be bound to fail. Other principles highlighted in that decision are that the Tribunal should exercise caution before depriving a litigant of a chance to have their claim heard, and particularly on an interlocutory proceeding not involving the hearing of oral evidence; that the Tribunal should not apply technical, artificial or mechanical rules in coming to a view about the case that a complainant wishes to advance; and that, in dealing with an application such as this, a complaint cannot be struck out as lacking in substance merely because it does not in itself contain the evidence supporting the claims made.
- 46 It may be that the BSGM report does not employ wording such as "defective". However, in addition to allegations that Burnham failed to perform the work in a timely fashion, what is alleged in the relevant paragraphs of the Amended Points of Claim is a failure on his part to carry out the works with reasonable care and skill and to carry out works in a proper and workmanlike manner. This is in addition to allegations of failing to perform the work in a timely fashion. However, the BSGM report does contain allegations of substantial variations from the approved Building Permit documents and this allegedly has the potential to create a variety of problems. It is also asserted that some flooding has occurred with resultant damage. I mention these matters because, even on the face of it, the BSGM report arguably contains material supporting allegations of an absence of reasonable care and skill. This is without turning to a consideration of whether the absence of sufficient particulars is sufficient to warrant a striking out pursuant to s.75, a proposition with which I have some difficulty.
- 47 I am also not prepared to strike out those paragraphs dealing with alleged breaches of statutory provisions (paragraphs 24(e) and 34(e)). I agree that these

allegations are extremely broad, but that does not mean that they are necessarily misconceived or that they are doomed to fail. Accordingly, as with the paragraphs alleging the absence of reasonable care and skill, which I also do not consider as doomed to fail, I am not prepared to strike them out. In addition, in neither instance do I consider that the absence of greater particularity need prevent the filing of Points of Defence.

- 48 However, in the interests of permitting Burnham to have a clearer idea of how Houndalas puts his claim, I am of the view that some further particulars would be helpful. I am not of the view that the provision of these particulars need hold up the filing and serving of Points of Defence. Burnham has been ordered on several occasions to file and serve Points of Defence. He has not done so. I agree with Ms Bizos that adequate information has been provided so as to enable this to be done, even if some of the Points of Defence are, of necessity, in a somewhat broad form. I would hasten to add that that is not an invitation to draft a meaningless blanket defence. The Amended Points of Claim, when read in conjunction with the Further and Better Particulars, are quite detailed, and an attempt should be made, wherever possible, to meet the claim in a meaningful way so that Houndalas also has some idea of what he is facing.
- 49 In my opinion, it would be helpful if Houndalas provided Further and Better Particulars in relation to the allegations contained in paragraphs 24(c) and (d) and paragraphs 32(a)-(f) and 34. Houndalas should spell out whether it is alleged that any, and if so what, defective work was performed by Burnham. If the alleged lack of care and skill in fact relates to the variations referred to in the BSGM report, that should be clarified. If it is alleged that loss and damage resulted from a failure to complete the works – for example, as the result of flooding – this should also be clarified. It should also be made clear as to whether, in relation to these points, Houndalas relies on anything other than the BSGM report, and if so, details of this should be provided. As shall be discussed, further particulars in relation to loss and damage should also be provided. I order that these Further and Better Particulars be filed and served on or before 31<sup>st</sup> July 2006.
- 50 I am also of the view that further particulars should be provided in relation to the allegations of breach of statutory provisions, as found in paragraphs 24(e) and 34(e). The Further and Better Particulars already provided in relation to paragraph 24(e) allege, under cover of objection, that Burnham has breached the provisions of Part 3, Part 4 and Part 5 of the *Building Act* 1993 and the Regulations thereunder. This is still a particularly broad allegation. If reliance is to be placed upon breach of statutory provisions, it would be useful if those provisions were identified earlier rather than later. As stated, I am not of the view that the filing and serving of Points of Defence should be delayed pending the provision of these further particulars. I order that these Further and Better Particulars be filed and served on or before 31<sup>st</sup> July 2006.
- 51 I turn now to Burnham's application pursuant to s.78 of the Act. As is apparent from the fact that I am ordering the providing of Further and Better Particulars, I am not acceding to Burnham's application to strike out the entire application

pursuant to s.78. Nor am I acceding to the application that, pursuant to the same section, I should determine the matter in favour of Houndalas.

- 52 Dealing firstly with Burnham's application, s.78 permits the dismissing or striking out of an application if, inter alia, an applicant has failed to comply with an order or direction of the Tribunal without reasonable excuse. It is upon this provision which Burnham relies. As was stated by Ashley J in *Corp Victoria Pty Ltd v Stevenson* [2003] VSC 255, the remedy provided by s.78(2) should be "of last resort and not first resort". Obviously that approach is to be followed.
- 53 I am not of the view that Houndalas has failed to comply with orders of the Tribunal without reasonable excuse. In this regard, Mr Mulcahy particularly emphasised orders in relation to Further and Better Particulars generally, and especially of loss and damage. It may be that there were occasions when such particulars were not supplied within the time limit specified. It may also be that such particulars were initially brief, and that those subsequently provided are based upon detailed lists without a clear explanation as to how parts of those lists translate into a specific and claimed sum. Whilst I think it desirable that there be some further clarification in this regard, I think that there is also force in the argument of Ms Bizos that several of the arguments advanced by Mr Mulcahy in fact relate to the presentation and strength of the evidence ultimately elicited at trial. An example is Mr Mulcahy's argument based upon the absence of a title, or of specific reference to the property in question, in the report of Prowse Quantity Surveyors. This is really a simple matter. It can readily be clarified. If it were established that the report in fact related to a totally different property, it would be irrelevant, useless and inadmissible. That is really a matter of evidence, and one which is capable of clarification well in advance of trial should such clarification be required.
- 54 As I stated during the conduct of the matter, there still seems to me to be the potential for some logical difficulty in relation to the manner in which loss and damage has been calculated. I appreciate that this may be a matter of evidence, or a matter to be explored at trial. Nevertheless, I am of the opinion that it would be useful if some further clarification took place now. The general thrust of how Houndalas sees loss and damage as being claimed may be apparent. However, given that the project was completed, there seem to me to be some problems in adopting an approach which seems to write off all or part of the value of the work performed by Burnham. Whilst frequently the amount of damages claimed in an action is global in nature, and frequently that figure alters (and often downwards) immediately prior to and during the trial, I am of the view that Houndalas should spell out what is being claimed and how it is being claimed, even if this cannot be reduced to a precise figure, although obviously that would be desirable. What should be spelt out is the mechanism by which the lists which have been provided translate into an amount of loss and damages, and, hopefully, into at least an approximate sum claimed. In other words, the method of calculation, in addition to the approximate sum claimed, should be clarified. Again, this need not delay the filing of Points of Defence. I order that Further and Better

Particulars for Loss and Damage be filed and served on or before 31<sup>st</sup> July 2006. Otherwise, Burnham's application pursuant to s.78 of the Act is dismissed.

- 55 Houndalas' application pursuant to s.78 is also dismissed. Certainly Burnham has persistently failed to comply with orders in relation to the filing and serving of Points of Defence. However, the self-executing order placed in position by Senior Member Cremean on 1<sup>st</sup> March 2006 deals with this matter. That order remains in place. Its operation has been extended by Senior Member Davis and by myself, the last such occasion being on 4<sup>th</sup> July 2006 when, Houndalas' solicitors having been contacted and there being no opposition to this, an order was made in chambers extending its operation to 21<sup>st</sup> July. I might add that, in these rulings, I am not extending it further. In any event, it would be somewhat incongruous to determine a matter against a party pursuant to s.78 because of a failure to comply with an order, and particularly a self-executing order, when the time limit imposed by that order has not yet expired.
- 56 I appreciate that there have been difficulties in relation to Burnham's compliance with costs orders. However, I am not prepared to determine a matter pursuant to s.78 of the Act on the basis of slow or reluctant compliance with relatively modest costs orders in a substantial proceeding such as this.
- 57 Accordingly, Houndalas' application pursuant to s.78 is also dismissed.
- 58 There was some discussion as to whether, subject to these rulings, the timetable set out by Senior Member Cremean would need alteration. In my view, it is highly desirable that the hearing date of 30<sup>th</sup> October 2006 remain. Subject to anything which the parties may have to say, I see no reason for altering the dates already in place for the exchange of experts' reports and witness statements. Some alterations to the timetable may be required because of the passage of time and because of these rulings, but for the moment I shall make no changes. Providing the ultimate hearing date is left in place, any suggestion from the parties concerning alterations to the timetable will, of course, be entertained and appreciated.
- 59 In conclusion, I would remind the parties of something that was said several times during the course of argument. This is not a court of pleadings. Obviously natural justice requires a party be informed of the case that it has to meet so that it can take the necessary steps to deal with the issues raised. It should be aware of the nature of the case that it is called upon to meet and be in possession of the broad outlines and facts which the other party will rely on to establish or defend the case. However, particularly in a case such as this, there is a danger that the objects of the Act may be lost sight of and swamped by technicalities and matters of fine pleading. Pursuant to s.98(1)(d) of the Act, it is mandatory that the Tribunal conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of the Act and a proper consideration of the matters before it permit. In the present case, both legal representatives have expressed the desire on the part of their respective clients to get on with the matter. That is commendable, particularly bearing in mind that this application has already been on foot for some sixteen months. I

am sure that, with some co-operation and ongoing consideration of the objects of the Act, the matter can now progress to its ultimate hearing on 30<sup>th</sup> October next.

- 60 I shall reserve the question of costs and other orders that may be required in relation to the future conduct of this proceeding. If required, I shall hear from the parties in relation to these matters at a date which can be arranged. In relation to costs, I warn the parties now that I am going to take some convincing that, in the particular circumstances of these applications and bearing in mind the orders which I now make, the basic situation concerning costs as set out in s.109(1) of the Act should not prevail.
- 61 The orders that I make are as follows:-
- (a) Pursuant to s.77(1) of the Act, references to the *Trade Practices Act 1974* in paragraphs 40, 42, 48, 50 and 58(e) of the Amended Points of Claim are struck out.
  - (b) The Respondent's application pursuant to s.75 of the Act is dismissed.
  - (c) The Respondent's application pursuant to s.78 of the Act is dismissed.
  - (d) The Applicants' application pursuant to s.78 of the Act is dismissed.
  - (e) The date by which the Respondent must file and serve Points of Defence, and the self-executing order in relation thereto made by Senior Member Cremean on 1<sup>st</sup> March 2006, remains extended to 21<sup>st</sup> July 2006.
  - (f) On or before 31<sup>st</sup> July 2006, the Applicants' shall file and serve Further and Better Particulars as follows:-
    - (i) Particulars of alleged negligence, lack of care and skill and the like in accordance with paragraph 49 of the Reasons for Decision delivered this day and attached hereto.
    - (ii) Particulars of any breach of statutory provisions in accordance with paragraph 50 of the Reasons for Decision delivered this day and attached hereto.
    - (iii) Particulars of loss and damage in accordance with paragraph 54 of the Reasons for Decision delivered this day and attached hereto.
  - (g) Question of costs reserved.
  - (h) Question of any alteration to the timetable fixed by Senior Member Cremean on 1<sup>st</sup> March 2006 reserved.
  - (i) Liberty to apply.

**Judge Bowman**  
**Vice President**